

Additional Commercial Contract Types

Public Meeting
October 19, 2004

Agenda

Welcome	Robin Schulze, DPAP
Ground Rules	Jerry Zaffos, GSA
Legislation	Ernest Dilworth, DOT
Appropriate Use	Mathew Blum, OMB
Terms & Conditions	Bill Timperley, DPAP
Payment	Dave Capitano, DPAP

Ground Rules

1. Purpose is to hear the views of all interested parties.
2. Meeting is not being held to achieve consensus or to write the rule itself.
3. Be respectful of other peoples views.

Legislation - *Authority*

Sec 1432 of PL 108-136 provides authority, subject to certain conditions, for the use of a time and material (T&M) or labor hour (LH) contract for the procurement of commercial services that are commonly sold to the general public through such contracts and are purchased on a competitive basis.

Legislation - *Conditions*

1) Use only for--

- commercial services procured for support of a commercial item, or
- any other category of commercial services designated in the FAR on the basis that:
 - (i) the commercial services are a type commonly sold to the general public using T&M or LH contracts, and**
 - (ii) it is the best interests of the Government to authorize use of T&M or LH contracts.**

Legislation - *Conditions*

- 2) Use only if the contracting officer--
- executes a determination and findings that no other contract type is suitable;
 - includes in the contract a ceiling price that the contractor exceeds at its own risk; and
 - authorizes any subsequent change in the ceiling price only upon a written determination that it is the best interest of the procuring agency to change the ceiling price.

Appropriate Use

I. Types of commercial services sold to the general public using T&M or LH contracts

- a. What types of services are predominately sold on T&M or LH basis?
 - > Public comment: repairs, legal services, accounting services, cleaning services, consulting services, training, certain building trades, quality assurance
- b. What types are rarely, if ever, sold on T&M or LH?
- c. What types are commonly sold on both T&M or LH and fixed-price basis?

Appropriate Use

II. Conditions for use

d. What are the conditions that typically exist for services commonly sold to the general public through use of T&M or LH contracts?

Appropriate Use

II. Conditions for use (con't.)

e. Should the rule restrict use of T&M and LH contracts to situations where it is not possible at the time of award to estimate accurately the extent or duration of work or to anticipate costs with a reasonable degree of confidence?

> ANPR: Would also permit use of T&M and LH where fixed pricing would unnecessarily inflate the government's costs or impose unreasonable risk on the contractor.

Appropriate Use

II. Conditions for use (con't.)

SARA states that T&M and LH contracts are authorized for the procurement of commercial services purchased by the agency on a competitive basis.

>ANPR: States that service must be acquired under a contract awarded using competitive procedures.

Appropriate Use

III. Establishing suitability of T&M and LH contracts.

f. What steps should a contracting officer (CO) be required to take to establish that a fixed-price type contract is not suitable?

>ANPR: Requires a D&F with sufficient facts and rationale to justify that no other contract type authorized by Part 12 is suitable.

Note: ANPR does not expect CO to address use of cost-type contract.

Appropriate Use

III. Establishing suitability of T&M and LH contracts (con't.)

ANPR: D&F must --

- (i) include a description of the market research conducted;
- (ii) establish that appropriate conditions for use exist; and
- (iii) establish that the requirement has been structured to minimize use of T&M and LH contracts to maximum extent practicable (e.g., by limiting the value or length of the contract or order).

Appropriate Use

III. Establishing suitability of T&M and LH contracts (con't.)

- > ANPR: When an indefinite delivery contract is to be used, agencies are encouraged to provide for issuance of orders on both T&M/LH and fixed price (FP) basis.
- A D&F would be executed for each T&M/LH order.
 - If the contract only provides for T&M/LH orders, the D&F must be approved one level above the CO and explain why it is not practicable to provide for FP orders.
- > Public comment: Don't assume only place for T&M or LH contract is where entire effort is to be procured on a T&M or LH basis.

Terms and Conditions

- Proposed Changes to 52.212-4 and Proposed Alt I
- 52.212-4 (a) Defects language
- Alt I
 - (a) Inspection/Acceptance
 - (i) Payments
 - (l) Termination for the Government's Convenience
 - (u) Subcontracts

Payment

- ANPRM uses current payment clause with certain revisions.
- Twelve key payment provisions for discussion

Key Payment Provisions

1. Substantiation of vouchers – Direct labor hours
2. Materials
3. Subcontract costs
4. Access to Records
5. Removal of withhold provisions
6. Total cost
7. Ceiling Price
8. Overpayments/Underpayments
9. Release of Claims
10. Prompt Payment
11. Electronic Funds Transfer
12. Discount

Substantiation of Vouchers

Direct Labor Hours

- ANPRM - Substantiation includes:
 - Evidence of actual payment
 - Individual daily job timecards
 - Other substantiation approved by the Contracting Officer
- Is there substantiation in commercial market, and if so, what does it involve?

Material Costs

- Actual cost of materials less rebates, refunds, discounts, substantiated by evidence of invoices and payment
- Cost paid in accordance with invoice and ordinarily within 30 days
- Materials obtained at most advantageous prices available, taking all discounts, rebates, allowances, etc.
- Materials sold regularly to general public reimbursed based on established catalog or list price, but may not exceed price to most favored customer

Subcontract Costs

- Reimbursement based on actual subcontract costs
- Cost paid in accordance with subcontract agreement and ordinarily within 30 days

Material Handling and Subcontract Administration Costs

- ANPRM: No separate reimbursement; requires that such costs be included in hourly rates
- ANPRM Question e:
 - How should material handling and subcontract administration costs charged?
 - If reimbursed based on actual rates, how can this be done without application of FR subpart 31.2?

Other Direct Costs

- Does materials and subcontracts adequately cover all other direct costs?
- Should clause be structured to address all forms of direct costs not included in the fixed hourly labor rate?
- Any problems encountered in this area under traditional T&M contracts?

Access to Records

- ANPRM - Labor hours:
 - Original timecards
 - Timekeeping procedures
 - Reports that show distribution of labor between jobs and contracts
- What records are obtained in commercial market/what verification is performed?

Access to Records

- ANPRM - Subcontract costs:
 - Subcontract agreement
 - Subcontractor invoices
 - Documents supporting payment of invoices
- What records are obtained in commercial market/what verification is performed?

Access to Records

- ANPRM - Material costs:
 - Invoices
 - Documents supporting payment of invoices
- What records are obtained in commercial market/what verification is performed?

Oversight

- ANPRM Question: c. What oversight is used to ensure work is properly charged?
- Are the allowability criteria and access to records requirements in the ANPRM inadequate, adequate, or overly burdensome for the extent of oversight needed?
- Will vouchers be processed in the same manner as non-commercial T&M contracts (e.g. DCAA review unless contractor has direct billing approval)?
- Should commercial T&M contracts be subject to Contractor Purchasing System Reviews?

Removal of Withhold Provisions

- Current payment clause requires withhold of 5% up to \$50,000
- Proposed rule would revise clause to make withhold optional at Contracting Officer discretion
- ANPRM removes withhold in its entirety

Total Costs

- Cost shall not exceed ceiling
- Contractor notifies Government when cost is anticipated to exceed 85% of ceiling
- Government will notify contractor if reason to believe work will be substantially more or less than ceiling

Ceiling Price

- ANPRM:
 - Government not obligated to pay any amount above ceiling
 - Contractor not obligated to continue performance if doing so will exceed ceiling prices unless notified by Contracting Officer
- Issue: Should ceiling prices be established with the expectation of service completion, and if so, how should clause be structured so that contractor receives reimbursement for work beyond completion?

Overpayments/Underpayments

- Remittance of amounts found to be overpaid.
- Payment of amounts remitted by contractor within 30 days unless parties agree otherwise
- Contractor shall notify Government immediately if it becomes aware of an overpayment

Release of Claims

- Contractor shall deliver a release of claims discharging Government from all liabilities and obligations except:
 - Specified claims in stated amounts
 - Claims based upon liabilities of the contractor to third parties arising out of performance of contract
 - Claims relating to patents

Prompt Payment

- Government will make payment in accordance with Prompt Payment Act

Electronic Funds Transfer (EFT)

- If Government will make payment by EFT, then the contract must include appropriate EFT clause at 52.212-5(b)

Discount

- Discounts computed from date of invoice
- Payments is considered to have been made on the date which appears on the payment check or the specified payment due date if EFT payment is made

Cost Accounting Standards (CAS)

- Currently no CAS exemption for T&M/LH contracts for commercial items
- Impact of CAS if applied to T&M/LH contracts for commercial items?

Wrap-Up

- Notes from public meeting to be posted by October 28, 2004 at <http://www.acq.osd.mil/dpap/dars>
- Public comment period closes November 19, 2004